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Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner.
v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE JILL STANEK AND THE ASSOCIATION OF PRO-LIFE PHYSICIANS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531), prohibits a physician from knowingly performing a "partial-birth abortion" (as defined in the statute) in or affecting interstate commerce. Section 3, 117 Stat. 1206-1207. The Act contains an exception for cases in which the abortion is necessary to preserve the life of the mother, but no corresponding exception for the health of the mother. Congress, however, made extensive factual findings, including a finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Section 2 (14)(O), 117 Stat. 1206. The question presented is:

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

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INTEREST OF AMICI CURIAE[1]

Jill Stanek is a registered nurse who witnessed firsthand aborted babies being born alive and then left to die, when she worked in the Labor & Delivery Department at Christ Hospital in Oak Lawn, Illinois. Mrs. Stanek brought the issue of "live-birth" abortions into the public eye in 1999. Her disclosure gained the attention of Congress, which subsequently adopted the Born Alive Infants Protection Act ("Born Alive Act") in 2002. Mrs. Stanek testified before Congress in 2000 and 2001 during committee hearings on the Born Alive Act and has since become a recognized leader in the fight to protect the rights of unborn and partially born children. Mrs. Stanek's testimony was also read into the record by Sen. Rick Santorum (R-Pa) during Senate floor debates for the Partial-Birth Abortion Ban Act that is the subject of this action. Mrs. Stanek was invited by President George W. Bush to attend the August 2002 signing of the Born Alive Act and the November 2003 signing of the Partial-Birth Abortion Ban Act.

The Association of Pro-Life Physicians ("The Association") is a national organization of physicians who are convinced that abortion kills an innocent human being and are committed to not performing or referring patients for an abortion. The Association seeks to employ its medical expertise and influence in the members' respective

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[1] Amici file this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae* or their counsel, made a monetary contribution to the preparation and submission of this brief.

communities to educate the public on the humanity and viability of the preborn child, and to encourage alternative responses to crisis pregnancies.

Mrs. Stanek and the Association are acutely aware of the need to recognize and protect the inalienable right to life for unborn and partially born children. As medical professionals, Mrs. Stanek and the Association are also acutely aware of the threat that "partial-birth abortion" poses to the integrity of the medical profession. The Partial-Birth Abortion Ban Act is critical to securing and preserving those rights. Mrs. Stanek and the Association want to ensure that this Court has the information necessary to examine the Partial-Birth Abortion Ban Act from the perspective of the state's interest in protecting the integrity of the medical profession and its longstanding role as the protector and preserver of human life.

SUMMARY OF ARGUMENT

When a physician intentionally replaces his lab coat with an executioner's robe in the course of delivering a child, then he should be subject to criminal sanctions. That is the message that Congress communicated when it enacted the Partial-Birth Abortion Ban Act of 2003 (the "Act"). Congress rightly determined that a procedure in which a child is delivered to within inches of birth for the sole purpose of being brutally killed is fundamentally incompatible with the physician's role as healer and must be banned. As Justice Kennedy observed:

> A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even

life which cannot survive without the assistance of others.

Stenberg v. Carhart, 530 U.S. 914, 961 (2000) (Kennedy, J. dissenting). Congress has done that by banning a procedure that "undermines the public's perception of the appropriate role of a physician during the delivery process." Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201, 1205.

Congress has taken sides in a medical debate "fraught with medical and scientific uncertainties" and appropriately sided with the "common belief" that the physician is obligated to preserve and protect life, not seek to destroy it. *See Marshall v. United States*, 414 U.S. 417, 427 (1974). Congress was faced with a conflict between statements from practitioners who perform "partial-birth abortions"[2] that the operation is a legitimate medical procedure and statements from other physicians that the procedure is unproven, unsafe and never medically necessary. Congress legitimately sided with the latter group, recognizing that banning the procedure comported with the physician's oath to preserve and protect life and preventing subversion of the physician's role as healer.

In defining "partial-birth abortion," Congress included a scienter element that further emphasizes the distinction between the banned procedure and conventional medical

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[2] Throughout this Brief, Amici will use the term "partial-birth abortion" to refer to the procedure defined in the statute. Partial-Birth Abortion Ban Act of 2003, Pub.L. No. 108-105, 117 Stat. 1201, 1204-1206 (2003). Since that procedure is arguably not an abortion, as discussed below, Amici will set off the phrase with quotation marks.

practice. That precise definition further demonstrates that the prohibited procedure is designed to destroy rather than preserve life and is therefore antithetical to the physician's role as protector and preserver of life. As such, it has been rightfully banned as impermissibly hostile to the foundational tenet of society – respect for human life.

This Court has repeatedly recognized that the State has legitimate and important interests in safeguarding health, maintaining medical standards and protecting potential life in the context of abortion regulation. *Roe v. Wade*, 410 U.S. 113,154 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 871 (1992). Those interests are even more acute in the case of the procedure that is the subject of the Act since the child is only inches from being fully born and, therefore, has an "autonomy which separates it from the right of the woman to choose treatments for her own body." 117 Stat. at 1205. That autonomy means that the Act is not a matter of regulating a "woman's right to choose," but of protecting and defending the integrity of the medical profession in its role as the protector and preserver of life.

ARGUMENT

I

CONGRESS HAS APPROPRIATELY EXERCISED ITS LEGITIMATE STATE INTEREST IN PROTECTING THE INTEGRITY OF THE MEDICAL PROFESSION BY PROHIBITING THE PROCEDURE KNOWN AS "PARTIAL BIRTH ABORTION."

The procedure banned by Congress is not "an abortion procedure that is embraced by the medical community," but "a disfavored procedure that is not only unnecessary to

preserve the health of the mother, but in fact poses serious risks to the long-term health of women and, in some circumstances, their lives." Pub.L. No. 108-105, 117 Stat. 1201 (2003). "A partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care." 117 Stat. at 1202. "Partial-birth abortion also confuses the medical, legal and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb in order to end that life." *Id.* at 1205.

> Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children – obstetricians who preserve and protect the life of the mother and the child – and instead uses those techniques to end the life of the partially-born child. Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

Id. For these reasons, *inter alia*, "Congress finds that partial-birth abortion . . . is in fact unrecognized as a valid abortion procedure by the mainstream medical community; . . .and confuses the role of the physician in childbirth and should, therefore, be banned." *Id.* at 1206.

Consequently, when it enacted the "Partial Birth Abortion

Ban Act of 2003," Congress was acting pursuant to its "interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000)(Kennedy, J. dissenting). "A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." *Id.* at 962. As Justice Kennedy stated and Congress subsequently confirmed, "[s]ubstantial medical authority shows that D&X [the dilatation and extraction procedure banned by Congress] perverts the natural birth process to a greater degree than D&E" [dilatation and evacuation] in that it commandeers the live birth process for the purpose of killing the child. *Id* at 962-963; *See* 117 Stat. at 1205. Justice Kennedy found in *Stenberg* that "Nebraska could conclude the ["partial-birth abortion"] procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion." *Stenberg*, 530 U.S. at 963. The same must be said for Congress in this case. Congress correctly concluded that the "partial-birth abortion" procedure banned in the Act posed a greater risk for disrespect for life and a greater risk to the integrity of the medical profession than do other procedures.

Congress found support for its conclusion, as did Justice Kennedy, from the American Medical Association, which stated that "'partial-birth abortion' or intact D&X is ethically wrong." AMA Board of Trustees' Fact Sheet on HR 1122

(June 1997), in App. To Brief of Association of American Physicians and Surgeons et al. as Amici Curiae in *Stenberg v. Carhart* 1, 2000 WL 228448. ("AMA Fact Sheet").[3] "The procedure is ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." AMA Fact Sheet at 1. "In the Board's view Intact D&X is not an accepted 'medical practice.'" *Id.* at 2. "There is no consensus among obstetricians about its use, and the Board's expert scientific report recommends against its use." *Id.* "It has never been subject to even a minimal amount of the normal medical practice development. It is not in the medical text books." *Id.*

In testimony before a joint hearing of the House and Senate judiciary committees, obstetrician Dr. Curtis Cook further explained how the procedure banned by the Act falls far outside the boundaries of legitimate medical procedures.

> There is no record of these procedures in any medical text, journals, or on-line medical service. There is no known quality assurance, credentialing, or other standard assessment usually associated with newly-described surgical techniques. Neither the CDC nor the Alan Guttmacher Institute have any data on partial birth abortion, and certainly no basis upon which to state the claim that it is a safer or even a

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[3] The AMA has opposed the Act because of the association's opposition to criminal sanctions against physicians, but it continues to oppose the procedure banned by the Act. H.R. REP. 108-58 at 15 (2003).

preferred procedure.[4]

"The only possible 'advantage' of partial birth abortion, if you can call it that, is that it guarantees a dead baby at time of delivery."[5] "I believe the unnecessary, unstudied, and potentially dangerous procedure of partial birth abortion is unworthy of continuance in modern obstetrics. It neither protects the life, the health or the future fertility of women, and certainly does not benefit the baby."[6]

As fellow obstetrician Dr. Nancy Romer stated, "When we concentrate on the medical facts, one can find no justification for the continued use of the procedure."[7]

> When a mother experiences medical complications during the second trimester of her pregnancy, what is required to save her life and protect her health *is not the death of her baby, but separation of the baby from the mother*. At stages of early viability, there is no danger in delivering a live baby by appropriate means and allowing neonatal care of the infant. Fetal survival at less than 24 weeks gestation has been reported to be

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[4] Curtis R. Cook, *Testimony of Dr. Curtis R. Cook Before the U.S. Senate Judiciary Committee and the Constitution Subcommittee of the U.S. House Judiciary Committee March 11, 1997*, 14 ISSUES L. & MED. 65, 68 (1998).

[5] *Id.* (emphasis added).

[6] *Id.* at 68-69.

[7] Nancy G. Romer, *The Medical Facts of Partial Birth Abortion*, 3 NEXUS 57, 62 (Fall 1998).

> about 30 percent and overall infant survival between 24 and 26 weeks gestation is reported to be between 50 and 75 percent. Clearly it is more appropriate to deliver the baby and provide neonatal support. In these cases, partial-birth abortion has no advantage over traditional methods of delivery. It is not shorter, and since the mother's health concerns require hospitalization, an outpatient procedure is not safer but riskier.[8]

Even when a woman is carrying a handicapped or deformed baby, "partial-birth abortion" is not medically necessary or preferable for the mother.[9] "The medical fact is that a handicapped fetus, even one with anomalies incompatible with life after birth, is not a threat to a woman's life or health" or "reproductive future."[10] "Partial-birth abortion does have one advantage when the fetus is handicapped: if the handicap is not life threatening to the fetus and there is expectation that the fetus will survive childbirth, partial-birth abortion assures that the fetus will be born dead."[11]

Stripped of the political rhetoric and viewed through the lens of medicine, "partial-birth abortion," therefore, is not merely one choice among many for "terminating a pregnancy," but is a procedure aimed at terminating the life of a partially-born child whom modern medicine has established

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[8] *Id.* at 60. (emphasis added).

[9] *See id.*

[10] *Id.*

[11] *Id.*

is "the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother."[12] "The unborn child today is treated as a separate patient in his or her own right, not only during childbirth and delivery, but from the earliest ages of gestation."[13] "Just because in one culture some adult human beings are not treated equally or not even given legal rights, does not mean they are not human beings. Science is oblivious to such concepts."[14] It is an indisputable biological fact that "the post implantation human embryo is a distinct human being," and "this biological fact should not be confused with moral or philosophical considerations."[15] That is particularly true when the child is no longer in utero, but is all but a few inches away from being born. The physician's ethical obligation of

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[12] Brief of the American Association of Prolife Obstetricians and Gynecologists(AAPLOG) et. al. as Amici Curiae in Support of Appellants, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), 1989 WL 1127638 at *5-6, *citing* Pritchard, MacDonald, & Gant, WILLIAMS OBSTETRICS 267 (17th ed. 1985).

[13] THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT SUBMITTED TO THE GOVERNOR AND LEGISLATURE OF SOUTH DAKOTA 26(2005), available at http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf.

[14] *Id.* at 29, citing Declaration of Dr. Ola Didrik Saugstad.

[15] *Id.* at 30.

"preserving life when there is hope of doing so,"[16] means that when undertaking the delivery of a child, the physician must seek to deliver the baby alive, not, as is the case in "partial-birth abortion," to "perform an overt act that he [the physician] knows will kill" the child.[17]

Similarly, the physician's promise to "practice [his] art in uprightness and honor," uttered as part of the Hippocratic Oath, "cannot include partially delivering a child, only to tear its skull open and kill the child before the delivery is completed."[18] "Can a doctor perform this procedure and coterminously fulfill his duty to uphold medical dignity? He cannot!"[19]

As is true with other aspects of medical practice, including organ donation, prescriptions for narcotics, and other procedures, "[d]octors and patients should not be allowed complete unrestricted autonomy" with regard to "partial-birth abortion."[20] "Clearly the state has a duty and an

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[16] William G. Plested, III, MD, *Physician Participation in Lethal Injection Violates Medical Ethics* (American Medical Association) July 17, 2006, available at http://www.ama-assn.org/ama/pub/category/16556.html.

[17] 117 Stat. At 1201.

[18] Stephanie D. Schmutz, *Infanticide or Civil Rights for Women: Did the Supreme Court Go Too Far in Stenberg v. Carhart?*, 39 HOUS. L. REV. 529, 559 (2002).

[19] *Id.* at 560.

[20] Romer, *The Medical Facts of Partial-Birth Abortion*, at 62.

obligation to provide regulation of medical care."[21]

As this Court has established, that duty and obligation is particularly important in the context of medical procedures dealing with the beginning and end of life. In rejecting arguments that a woman's right to choose abortion is absolute, the *Roe* majority said that "a State may properly assert important interests in safeguarding health, *in maintaining medical standards*, and in protecting potential life." *Roe v. Wade*, 410 U.S. 113,154 (1973) (emphasis added). In reaffirming the "central holding" of *Roe*, the majority in *Casey* again emphasized the state's substantial interests in the regulation of abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871-873 (1992). "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Id.* at 876. Abortion has consequences beyond the woman and the unborn child, but is "fraught with consequences for ... the persons who perform and assist in the procedure [and for] society which must confront the knowledge that the procedures exist, procedures some deem nothing short of an act of violence against innocent human life." *Id.* at 852. The state's interests in regulating abortion and procedures such as "partial-birth abortion" must also extend beyond the women and the unborn child. *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000)(Kennedy, J. dissenting). "A state may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." *Id.*, *citing Washington v. Glucksberg*, 521 U.S. 702, 730-734

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[21] *Id.*

(1997).

In *Glucksberg* and its companion case, *Vacco v. Quill*, 521 U.S. 793 (1997), the Court upheld state laws against physician-assisted suicide. Just as the Act at issue in this case prohibits physicians from terminating the life of vulnerable partially born children, the acts upheld in *Glucksberg* and *Vacco* prohibited physicians from terminating the life of vulnerable terminally ill patients. In *Glucksberg*, the Court emphasized that "[t]he State also has an interest in protecting the integrity and ethics of the medical profession." 521 U.S. at 731. The *Glucksberg* court rejected the lower court's conclusion that the integrity of the medical profession would not be threatened in any way by physician-assisted suicide. *Id.* As is true with the "partial-birth abortion" procedure in this case, the American Medical Association had concluded that physician-assisted suicide is "fundamentally incompatible with the physician's role as healer," and physicians had testified that it could undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. *Id.* Those conclusions substantiated the state's legitimate and valuable interest in promoting and protecting the integrity of the medical profession. *Id.* at 735. In *Vacco*, the Court affirmed that New York's essentially identical reasons for prohibiting physician-assisted suicide – including prohibiting intentional killing, preserving life, and maintaining physicians' role as their patients' healers – were "valid and important public interests [that] easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end." 521 U.S. at 808-809. Likewise, Congress's reasons for prohibiting "partial-birth abortion" – to promote maternal health, draw a bright line distinguishing abortion and infanticide, preserve the integrity of the medical profession

and promote respect for human life – are valid and important interests that justify the regulation.

The Partial Birth Abortion Ban Act of 2003 is not, as the trial and appellate courts held, a regulation that imposes an undue burden on a woman's right to obtain an abortion. Instead, it is a necessary and appropriate exercise of Congress's power to preserve and protect the inalienable right to life for all people – born and unborn, preserve the integrity of the medical profession and ensure that the most vulnerable and defenseless citizens are protected from exploitation and extermination. The procedure prohibited by the Act is not an accepted medical procedure, is disfavored by medical experts and the public, is recognized by the medical community as ethically wrong, is destructive of the public's trust in the medical profession and is a perversion of the process that is meant to usher in, not terminate, life. Congress has acted in accordance with this Court's precedents, as well as longstanding medical, legal and ethical tenets, to prohibit physicians from deliberately killing patients just seconds before birth.

II

CONGRESS'S SCIENTER REQUIREMENT IN THE PBA BAN ACT DISTINGUISHES THE PROCEDURE FROM A LEGITIMATE MEDICAL PROCEDURE AND DEMONSTRATES THAT IT IS IN REALITY A PROCEDURE AIMED AT TERMINATING LIFE, WHICH IS ANTITHETICAL TO THE PHYSICIAN'S ROLE AS HEALER.

Congress thoughtfully and carefully drafted the definition of "partial-birth abortion" to include a scienter element – premeditated intent to deliver and kill a partially born child –

that clearly sets it apart from abortions that are protected by this Court's rulings in *Roe* and its progeny. Congress explicitly addressed the concerns this Court raised in *Stenberg v. Carhart*, 530 U.S. 914 (2000) about the imprecision of Nebraska's definition of "partial-birth abortion:"

> The Court's definitional objections have been remedied in H.R. 760 by drafting a more precise definition of the prohibited procedure. Previous versions of the bill defined a partial-birth abortion as "an abortion in which the person performing the abortion partially-vaginally delivers a living fetus before killing the fetus and completing delivery. "The language the Court objected to in *Stenberg* was virtually identical. Under the current version of the ban, "partial-birth abortion" is defined as "an abortion in which – (A) the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother *for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus;* and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.[22]
>
> This term is sufficiently precise to address the *Stenberg* Court's concern that the definition of the

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[22] H.R. REP. 108-58 at 6 (2003) (emphasis added).

> prohibited procedure clearly track the medical differences between a partial-birth abortion and other abortions procedures in which the act leading to death occurs in the uterus.[23]

While under *Roe* and *Casey* "a pregnancy may be terminated, partial-birth abortion should not implicate this right because the pregnancy ended once the birth process began and the right to terminate one's pregnancy by aborting one's unborn child does not include an independent right to assure the death of that child regardless of its location to its mother."[24] "This, too, has not gone unnoticed by the American Medical Association, which has recognized that partial-birth abortions are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb.'"[25] "Thus, by aborting a child in a manner that purposefully seeks to kill a child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process and perverts a process during which life is brought into the world in order to destroy a near-breathing child."[26]

Prosecution under the Act, therefore, requires a specific intent to initiate the delivery of a child for the purpose of killing the child when all but his head is outside of the

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[23] *Id.* at 19.

[24] *Id.* at 21-22.

[25] *Id.* at 22.

[26] *Id.*

mother's body. This specific intent to kill a living child approaching birth places the "partial-birth abortion" procedure in the same category as physician-assisted suicide, which requires a specific intent to kill a patient approaching death. In both cases, the physician is acting with the intent to terminate an existing life, not to preserve life or relieve pain. As this Court has established, that distinction is critical in determining whether a statute regulating certain conduct by physicians is constitutional.

In *Vacco v. Quill*, 521 U.S. 793 (1997), this Court discussed the importance of intent and causation in determining whether a prohibition on assisted suicide violates equal protection. If the intent of the physician is to kill the patient, then that violates his role as healer and is properly prohibited, but if the intent is to alleviate pain which then results in the hastening of death, that does not fall within the prohibition. *Id.* at 801-802.

> First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 368 (1996) (testimony of Dr. Leon R. Kass). The same is true

> when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." *Id.*, at 367. Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences.

Id. at 801-803.

Congress drafted the definition of "partial-birth abortion" with this distinction in mind. The conduct prohibited under the Act is undertaking the delivery of a live unborn child for the purpose of killing the child.[27] In other words, the physician is initiating labor and delivery because it will enable him to perform an "overt act" that he knows will kill the child. [28]As Drs. Cook and Romer explained, the purpose behind the "partial-birth abortion" procedure is not to terminate a pregnancy – i.e., remove the unborn child from the mother's womb – but to kill the child.[29] "Thus, the physician acts directly against the physical life of a child,

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[27] *See* H.R. REP. 108-58 at 22.

[28] *See id.*

[29] Cook, 14 ISSUES L. & MED. at 68; Romer, *The Medical Facts of Partial-Birth Abortion*, at 60.

whom he or she had just delivered all but the head out of the womb, *in order to end that life.*"[30] A physician engaging in "partial-birth abortion," as defined by the Act, is perverting the labor and delivery process, meant to bring life into the world, by using it to end life in the same manner that a physician engaging in assisted suicide is perverting palliative care, meant to improve life, in order to end it. Consequently, just as this Court found in the context of laws prohibiting assisted suicide, this law prohibiting "partial-birth abortion" is an appropriate exercise of Congress's power to regulate the medical profession.

As Justice Stevens has observed:

> There is truth in John Donne's observation that "No man is an island." The State has an interest in preserving and fostering the benefits that every human being may provide to the community – a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. Thus, I fully agree with the Court that the "liberty" protected by the Due Process Clause does not include a categorical "right to commit suicide" which itself includes a right to assistance in doing so.

Washington v. Glucksberg, 521 U.S. 702, 740-741 (1997) (Stevens, J. concurring). "In most cases, the individual's

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[30] H.R. REP. 108-58 at 22. (Emphasis added).

constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life." *Id.* at 742. Similarly, as Congress found, any right to physical autonomy that might exist in choosing to terminate a pregnancy will give way to the State's interest in preserving human life when the pregnancy has been terminated by delivery of a child with the exception of a few inches.[31] The "liberty interest" asserted in *Roe* and *Casey* "does not include an independent right to assure the death of [a] child regardless of its location to its mother," and Congress "has a heightened interest in protecting the life of the partially-born child."[32] Congress has asserted that interest by enacting a carefully drafted statute that clearly defines the prohibited act.

III

CONGRESS'S PASSAGE OF THE PBA BAN ACT REPRESENTS A LEGITIMATE EXERCISE OF ITS POWER TO RESOLVE MATTERS UPON WHICH PHYSICIANS DISAGREE IN FAVOR OF THE PRESERVATION OF LIFE.

As the evidence before Congress and the lower courts aptly demonstrates, there is some disagreement within the medical community about whether "partial-birth abortion" is an accepted, safe and ethical medical procedure.[33] In such

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[31] *See* H.R. REP. 108-58 at 22.

[32] *Id.*

[33] *See id.* (describing the conflicting medical evidence).

cases, Congress and state legislatures are permitted to "take sides" in the debate and are to be given wide latitude with regard to their final decision. *See Stenberg v. Carhart*, 530 U.S. 914, 970 (2000) (Kennedy, J dissenting). As Justice Kennedy observed, there is "substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature." *Id.*

That substantial authority dates back to at least 1905, when this Court upheld Massachusetts' decision to require that all citizens be vaccinated against smallpox despite testimony from physicians who questioned the effectiveness of the vaccine. *Jacobson v. Massachusetts,* 197 U.S. 11, 30 (1905).

> Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not

> compelled to commit a matter involving the public health and safety to the final decision of a court or jury.

Id. Similarly, Congress was aware of the opposing theories regarding the safety and legitimacy of the "partial-birth abortion" procedure, having conducted extensive hearings during the 104th, 105th and 107th legislative sessions.[34] Congress was compelled to choose between the opposing theories, and chose the theory that comported with the "common belief" of the medical community and the American people – that a procedure which perverts the birth process in order to effectuate the brutal killing of a partially born child is antithetical to the role of a physician as healer.

"When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417,427(1974). "[D]isagreements among medical professionals don't tie the state's hands in setting the bounds of law." *Kansas v. Hendricks*, 521 U.S. 346, 360 n3 (1997).

While Congress had statements from those who perform "partial-birth abortions" that the procedure is safe and appropriate for certain medical conditions,[35] it also had statements such as the following from Dr. Cook:

> I have personally cared for many cases of all of these

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[34] H.R. REP. 108-58 at 12.

[35] *See id.* at 14-19.

> disorders, and have never required any technique like partial birth abortion in order to accomplish delivery. Additionally, I have never had a colleague that I have known to have used the technique of partial birth abortion in order to accomplish delivery in this same group of patients. Moreover there are high profile providers of third trimester abortions who likewise do not use the technique of partial birth abortion. In the even rarer case of a severe maternal medical condition requiring early delivery, partial birth abortion is not preferred, and medical induction suffices without threatening future fertility. Again, the killing of the fetus is not required, only separation from the mother.[36]

In addition, Congress had statements from the AMA that the procedure "is not an accepted medical practice," and from Dr. Pamela Smith that physicians were horrified to know that such a procedure "was even legal."[37]

Such differences of opinion do not hamstring Congress in its efforts to regulate and protect the integrity of the medical profession. Instead, Congress is permitted to take sides in the debate and establish a regulation that best fulfills the legislature's goals to promote maternal health, preserve the integrity of the medical profession and promote respect for human life. The Act, which bans a procedure that is "disturbingly similar to the killing of a newborn, promotes a complete disregard for infant human life, and . . .further coarsens society to the humanity of, not only newborns, but

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[36] Cook, 14 ISSUES L. & MED. at 68.

[37] H.R. REP. 108-58 at 20.

all vulnerable and innocent human life"[38] is such a regulation. As this Court has established, Congress's decision must be given wide latitude, and "courts should be cautious not to rewrite legislation. . . ." *Marshall,* 414 US at 427.

CONCLUSION

Congress has appropriately banned a gruesome and inhumane procedure that is unrecognized as a valid abortion procedure by the medical community, poses health risks to the mother, blurs the line between abortion and infanticide and confuses the role of the physician in childbirth. Congress has fulfilled its duty to protect the integrity of the medical profession and its duty to preserve and promote life. Congress has defined the procedure with precision so as to clearly track the difference between it and the abortion procedures protected by *Roe v. Wade*. Finally, Congress has appropriately sided with the preservation of life by taking sides in a medical debate fraught with conflict and emotion.

For these reasons, the Ninth Circuit's decision invalidating the Act must be reversed.

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[38] *Id.* at 22-23.